No. 77-1351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

v.

JOHNS-MANVILLE PRODUCTS CORPORATION

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a)* is reported at 557 F.2d 1126. The Decision and Order of the National Labor Relations Board, including the Decision of the Administrative Law Judge

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* References to the Appendix to the Petition are designated by "Pet. App." References to the Transcript filed in the court below are designated by "Tr."

(Pet. App. 50a-111a), are reported at 223 N.L.R.B. 1317.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether employee sabotage that forced the closing of a plant constituted an in-plant strike that justified the hiring of permanent replacements in order to keep the plant in operation and to avoid continuing and substantial economic losses.

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in pertinent part as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, provides in pertinent part as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .
>
> * * * *

> (5) to refuse to bargain collectively with the representatives of his employees. . . .

STATEMENT

Respondent Johns-Manville Products Corporation ("the Company") owned and operated a plant in New Orleans where it manufactured organic felt, a form of paper that is one of the principal components of asphalt roofing. The plant covers five separate buildings with approximately 40,000 square feet of floorspace. The manufacturing process consists of the following steps. Wood chips and waste paper are reduced to a slurry form and then blended together to form the paper stock. The stock is transferred to forming machines, which create a wet fibrous web. The continuous paper web is conveyed through a long series of squeezing rollers and dryer drums in order to reduce the moisture content of the paper to the point where it can be wound onto large rolls (Pet. App. 3a).

Both the paper product and production machinery are peculiarly subject to many types of disruption along the entire length of the process. Scrap metal can be introduced to jam and damage the machinery. Tampering with the valves controlling the blending of the paper and wood slurries can result in breaks in the fibrous paper web; maladjustment of the roller rpm in the various dryer sections can have the same effect. The web may be broken (causing a halt in production) along the entire length of each of the two forming machines (150 and 200 feet long) merely by striking the delicate sheet with one's finger. All of this tampering can be carried out surreptitiously, which makes it virtually impossible to identify the guilty parties (Pet. App. 3a).

The 107 production and maintenance employees at the plant were represented by the Oil, Chemical and Atomic Workers International Union, AFL-CIO ("the Union"). On September 11, 1973, Johns-Manville and the Union held the first of a series of negotiating sessions in order to arrive at a collective bargaining agreement to replace a two year contract that was due to expire on October 12 (Pet. App. 4a). Although the Company met and bargained in good faith, production at the plant did not continue unaffected by the failure to reach a new agreement. As had occurred during previous negotiations,[1] the plant experienced a significant increase in paper breaks and the consequent disruption of production. Eventually during this negotiating period, the destructive and disabling acts of sabotage reached a peak that was unparalleled in previous years. This forced the eventual shutdown of the plant (Pet. App. 7a-8a).

The disruption in September began with the increase in paper breaks. In the two month period before the shutdown of the plant in October, the weekly average of paper breaks more than doubled. The breaks occurred during each of the plant's three shifts. In addition, the excessive number of paper breaks coincided with the negotiation sessions that were held during this period (Pet. App. 5a).

Beginning in October, the paper breaks began to be accompanied by even more serious forms of disruption. On October 2, the day before a bargaining session was

[1] The court of appeals noted that during the 1969 negotiations, the paper breaks forced a shutdown of the mill. In the 1971-1972 negotiations, paper breaks increased to an average of fifteen to twenty per week (Pet. App. 8a, n. 11).

to occur, a 2,300 volt power switch with a double safety lock was disconnected and the entire plant was shut down as a result. The switch was located in an entirely different building from the one in which the forming machines were located (Pet. App. 5a). On the same day, the mill began to experience the destruction of production machinery. One of the fine mesh stainless steel cylinders on a paper forming machine was sharply cut along its circumference in a manner that was completely inconsistent with accidental damage. Later on in the week, one of the three defibrators used to grind up the wood chips became inoperable due to excessive vibration. An inspection revealed ball bearings between the grinding discs of the machine (Pet. App. 5a-6a).

In an effort to halt the growing sabotage, a plant official contacted the Union local president to request Union help in controlling the disruptions. The president, without making any effort to halt the sabotage, simply disavowed responsibility and responded by stating, "We got a bunch of radicals down there and I can't do anything with them" (Pet. App. 77a). Further company requests for assistance were met with silence by the Union negotiating committee (Pet. App. 6a).

The lack of success of the Company's efforts to curb the disruptions was demonstrated the following week when, on October 11 and 12, the paper breaks reached a new peak of disabling frequency. So many breaks occurred that by the 12th the forming machines were inoperable because of the accumulation of scrap paper in the pits beneath the machine conveyors (Pet. App.

7a). In response to the massive disruption, Company officials decided to shut down the plant temporarily.[2]

After a nine-day layoff, the Company attempted to resume production on October 22. The attempt was thwarted by massive sabotage of both product and production machinery. Paper breaks became so numerous that they were "almost impossible to count" (Tr. 319). During the three-shift, 24-hour period of the 22nd, production was cut to less than 12% of the normal output (Pet. App. 7a, 78a).

Even more disruptive and potentially dangerous was the sabotage of equipment. All three of the defibrators were jammed with junk metal and had to be shut down. An inspection revealed bearings, nuts, and bolts between the defibrators' damaged grinding discs, as well as in the screw conveyor leading from the service bins to the defibrators. In the service bins themselves, inspectors discovered even larger pieces of scrap metal, including broken conveyor links and pieces of scrap pipe. In the wood chip storage silos, Company officials found heavy steel rail chocks used to block the wheels of railroad hopper cars. If the large material in the service bins had worked its way into the defibrators, it could have caused an explosion that not only would have destroyed mill property, but would have endangered lives as well (Pet. App. 7a-8a, 78a-79a).

At this point, the Company determined that since further production without a contract could take place only at the risk of plant equipment and human lives,

[2] During the shutdown, the machinery was carefully inspected in order to determine whether equipment malfunction could have been responsible for the excessive paper breaks. The check confirmed that the equipment was in proper working order and could not have been the cause of the disruption (Pet. App. 7a).

the plant would be shut down. On October 31, Company representatives met with Union leaders and plant employees and announced that because of the sabotage, no further attempts would be made to open the plant with regular employees until a contract was reached (Pet. App. 8a).

Union officials expressed little concern about this development. A strike vote had already been taken and strike authorization had been received from the International. The Union bargaining representative stated, "You let us go before and we will go again" (Pet. App. 8a). He added, "We can hold out to any amount of pressure you can give us. We will not settle for any less than other plants" (Pet. App. 8a). In the face of this attitude,[3] further Company efforts to break the negotiating impasse proved fruitless.

In an effort to maintain some level of production at the New Orleans mill in order to support the manufacturing operations at other Johns-Manville plants which utilized the paper, the Company began operation with temporary replacements in mid-November. After 5 months of production with the temporary staff, which included salaried employees and employees imported from other plants, production was one-third lower than normal and the cost per ton was twice as high. As a result, in addition to its losses at the paper plant, the Company was forced to cut back production and lay off employees at the other plants as well. By the end of March, operation with temporary replacements had resulted in a pre-tax loss of $1.5 million

[3] The Union's determination to remain out of work was buttressed by the receipt of unemployment benefits as well as the payment of union benefits to the employees (Pet. App. 8a-9a, n. 12).

which was continuing to accumulate at a rate of $280,000 to $300,000 per month (Pet. App. 9a-10a).

After further attempts to negotiate a settlement, including a fruitless meeting on March 20 with the Union's International President, the Company decided it had no other choice than to hire permanent replacements. Its decision was based on three principal factors. First, given the history of sabotage and disruption at the plant, it did not appear reasonable to resume operations with regular employees in the absence of a contract or any assurance that the disruptions would cease. Second, the Company was suffering great economic losses as the result of operation with temporary replacements. Third, the use of temporaries was inflicting unacceptable production losses on the Company and forcing the shutdown of other facilities.[4] Because of these factors, the Company began to hire replacements in April and completed the process by mid-July [5] (Pet. App. 9a-10a).

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[4] Contrary to petitioner's suggestion (Pet. p. 4) that respondent's replacement decision was prompted solely or "largely by acts of sabotage," the record shows that this was only one of three principal factors considered (Pet. App. 9a-10a).

[5] Sometime in April, after the end of the six-month unemployment benefit period, the Union put up a picket line. Before that time, no picket line had been established because of instructions to employees from the Union's international representative that a picket line would jeopardize their receipt of unemployment benefits. These facts, as well as the Union's pre-lockout strike authorization, employees' receipt of what might fairly be called strike benefits, their post-lockout rejection of an improved Company contract offer, and their failure to make an unconditional offer to return to work, all demonstrate that the in-plant strike was transformed into a traditional strike, that is, a complete withholding of services, on and after November 1, 1973. That strike continued until at least the time of the hearing.

For this action, the Board held the Company in violation of sections 8(a)(1), (a)(3), and (a)(5) of the National Labor Relations Act.[6] The Board approved the use of temporary replacements on the ground that the continuing threat of sabotage forced the Company to close the plant to regular employees in the absence of a contract (Pet. App. 54a-55a). In spite of this conclusion, however, the Board refused to characterize the forced closure as an in-plant strike that would justify permanent replacement (Pet. App. 53a).

The court of appeals reversed, and held, based on the undisputed facts, that "as a matter of law, the employees were involved in what amounted to an in-plant strike. The employees' conduct was so severe that we cannot help but find that their behavior was tantamount to a strike and forced the Company to lock them out" (Pet. App. 12a). The court further held that since the employees' actions constituted an in-plant strike, the Company's hiring of permanent replacements was within the long-held rule permitting the replacement of economic strikers. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (Pet. App. 13a).[7]

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[6] Section 8 of the National Labor Relations Act, as amended, is codified at 29 U.S.C. 158.

[7] The court also noted that the Board had found no evidence of anti-union motivation. In fact, as the court stated, "The history of the relationship between the parties reveals the Company's continuing desire to negotiate and full recognition and acceptance of the Union, notwithstanding numerous incidents of prior sabotage by the employees" (Pet. App. 12a-13a). In the face of the Union's non-responsive attitude on the sabotage problem, the court found it could not "condone behavior which causes actual and substantial damage to property or potential, serious injury to human lives" (Pet. App. 13a).

ARGUMENT

The key fact that emerges from the bizarre history of this labor dispute is that because of a crescendo of employee sabotage, facilitated and rendered virtually undetectable by the unusual nature of the plant's manufacturing process,[8] the Company was forced to close the mill to regular employees until a contract was reached. The Board adopted this vital factual conclusion in stating that the Company (Pet. App. 54a):

> "had a reasonable apprehension that if it resumed normal business production with its own employees substantial disruptions in its productive process would soon take place against its substantial economic interest and those of its customers and to the great detriment of the New Orleans operation."

The Board's admission that the threat of employee sabotage required the Company to keep the plant closed was confirmed by its determination that (Pet. App. 55a):

> "[c]ertainly Respondent was faced with unusual operational problems and hazards and most probable and irreplaceable economic loss had it resumed operating the plant without completing an agreement with the Union."

This unprecedented factual context shows the special circumstances of this case. No other case is known pre-

[8] The undisputed evidence in the record of this case, including the testimony of one of the government's own witnesses, demonstrates that the perpetrators of the sabotage were undetectable by any reasonable means (Pet. App. 3a).

senting similar facts. In this situation, review of the decision of the court of appeals is unwarranted.[9]

The unique facts of this case set it apart from the skirmishes that frequently mark labor-management confrontations. The forced long-term shutdown of an entire plant is a far cry from the cases involving picket line violence and other recurring problems of labor-management strife. Thus, the court of appeals here was neither addressing a problem of widespread significance nor establishing a precedent that is likely to be called upon frequently in the future. Rather, it was fashioning a narrow legal response addressed specifically to the factual situation in this case.

The conclusion of the court of appeals that the Company was justified in hiring permanent replacements to protect itself against a plant closing forced upon it by employee activity is fully warranted. At the time the employees were permanently replaced, the Company was faced with the following dilemma: As the Board found (Pet. App. 51a, 55a), the Company had bargained in good faith with the Union and exhibited no anti-union motivation. Yet the Company, up to the time it replaced its work force, was prevented from resuming normal business operations because of the "reasonable apprehension that if it resumed normal business production with its employees substantial disruptions in its productive process would take place. . . ." (Pet. App. 54a). While the Union members were receiving unemployment compensation and union benefits, the Company, operating with temporary replacements, suffered a $1.5 million pre-tax loss and

[9] In this regard, it should be noted that the Board itself has not petitioned for certiorari in this case.

was being forced to lay off employees and curtail production at other plants. In this situation, the court of appeals was correct in ruling that it was appropriate to apply the holding of *NLRB* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333, 345 (1938), that "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers."

The unusual facts of this case also distinguish it from the numerous cases involving picket line violence and sit down strikes cited by petitioner: *Stewart Die Casting Corp.* v. *NLRB*, 114 F.2d 849 (5th Cir. 1940), *cert. denied*, 312 U.S. 680 (1941); *NLRB* v. *Clinchfield Coal Co.*, 145 F.2d 66 (4th Cir. 1944); *NLRB* v. *Mt. Clemens Pottery Co.*, 147 F.2d 262 (6th Cir. 1945); *NLRB* v. *Sea-Land Service, Inc.*, 356 F.2d 955 (1st Cir.), *cert. denied*, 385 U.S. 900 (1966); *International Ladies' Garment Workers* v. *NLRB*, 237 F.2d 545 (D.C. Cir. 1956); *NLRB* v. *Wichita Television Corp.*, 277 F.2d 579 (10th Cir.), *cert. denied*, 364 U.S. 871 (1960). All of these cases involved the discharge of employees who had offered to return to work. In the present case, no such offer was made. In the absence of such an offer and because of the factors discussed above, the Company replaced—as distinguished from discharged—employees in order to resume normal plant operations. The employees who were replaced here, however, retained rights accorded economic strikers which are not possessed by employees who are discharged for unlawful activity.[10] Unlike the cases cited by petitioner, where the employers openly challenged employees' retention of rights accorded economic strikers by taking discharge action against them, the Company did not challenge the retention of these rights in this case. The Company merely hired permanent replacements, motivated not by a desire to retaliate for the sabotage, but rather by the legitimate desire to cut economic losses by resuming normal operations. Therefore, the cases cited by petitioner are clearly distinguishable from the facts here and are not in conflict with the decision of the court of appeals.

The distinction between the discharge cases and the present dispute is further underscored by an additional factual difference. Unlike the instant case, none of the employees' actions in those cases posed a widespread or continuing threat to uninterrupted production. Their actions were isolated, one-time occurrences that did not cause a sustained disruption of plant operations and the individuals who were actually guilty of the misdeeds were not only identifiable, but identified. In the present case the employees' actions constituted a continuing threat to production which prevented the Company from reopening the plant to them as effectively as a walkout with a picket line. The court of appeals thus reasonably concluded that the balance struck by this Court in *Mackay* was applicable to this case and permitted the Company to protect its production and economic well-being by replacing the employees.

Any other result would work a gross injustice in this case. Employees who engaged in industrial sabotage,

[10] For example, the replaced employees retained recall rights to jobs vacated by their replacements. *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). They also remained eligible to vote in any representation election conducted within twelve months after the commencement of the strike. *Wahl Clipper Corp.*, 195 N.L.R.B. 634 (1972).

perhaps lured by the prospect of unemployment benefits that would be unavailable in the event of a traditional strike,[11] would be rewarded for their destructive efforts. The Company, on the other hand, despite its good faith negotiations, would have to endure crippling losses as the result of a plant closing forced upon it by employee sabotage. Under traditional balancing principles, as reflected in the *Mackay* decision which the court of appeals followed, the court's decision was correct and is significant only as a footnote to mark the extremes which labor-management relations in this country fortunately only rarely reach.

It should be noted in closing that, as petitioner points out (Pet. p. 13-14), the issue whether an employer may permanently replace employees who have been locked out was not decided by the court of appeals. Given the general significance of that issue, it would be inappropriate for this Court to accept review before a single court of appeals has had the opportunity to consider the question. The only issue before the Court at the present time is whether given the specific and unusual facts of this case, the court of appeals was correct in concluding that the actions of the employees amounted to an in-plant strike.

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[11] *See Johns-Manville Products Corp.* v. *Doyal*, 510 F.2d 1196 (5th Cir. 1975).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 24, 1978